MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, March 22, 2006
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, Francis J. Carney, Terrie T. McIntosh, Leslie W. Slaugh, James T. Blanch, Honorable Lyle R. Anderson, Honorable David O. Nuffer, Janet H. Smith, Jonathan Hafen, Thomas R. Lee, Virginia S. Smith, Judge R. Scott Waterfall, Debora Threedy

EXCUSED: Thomas R. Karrenberg, Todd M. Shaughnessy, Cullen Battle, Honorable Anthony B. Quinn, Honorable Anthony W. Schofield, David W. Scofield

STAFF: Tim Shea, Brent Johnson, Matty Branch, Trystan B. Smith

I. APPROVAL OF MINUTES.

Mr. Wikstrom called the meeting to order at 4:07 p.m. Mr. Blanch moved to approve the February 2006 minutes as submitted. The committee unanimously approved the minutes.

II. RULE 63. DISQUALIFICATION.

Mr. Shea and Brent Johnson brought Rule 63 back to the committee. Mr. Johnson indicated the Third District judges asked that Rule 63 be clarified to require a judge to take no further action after being presented with an affidavit alleging bias.

The committee debated a suggested addition to Rule 63(b)(2) which included the term "or proceedings" in the second clause of the subsection's first sentence. Judge Anderson and Mr. Lee indicated concern that the term "or proceedings" may be unclear and ambiguous. Mr. Lee suggested the addition of "court" or "court proceedings" so that practitioners are clear that they can proceed with discovery and other like matters after filing of a disqualification motion.

Mr. Wikstrom suggested adding a new sentence, after the first sentence of subsection (b)(2), which states: "The judge shall take no further action in the case until the motion is decided."

After further debate, the committee decided it would not include "or proceedings" in the first sentence of subsection (b)(2), but unanimously agreed to include the suggested second sentence.

III. RULE 8. DECLARATION UNDER PENALTY OF PERJURY.

Mr. Shea brought Rule 8 back to the committee. The committee again voiced its concern that the current Utah perjury statute would not apply to a declaration.

Mr. Wikstrom suggested the committee not amend Rule 8 until legislation was passed that made the penalty for a false declaration similar to the penalty for a false statement made under oath or affirmation. Currently, a person guilty of making a false declaration would be guilty of Class B misdemeanor as opposed to a Second Degree felony for making a false statement under oath or affirmation.

The committee agreed it would not amend Rule 8. It should be noted the committee did not feel it appropriate to amend Rule 8 allowing a party to substitute a declaration for an affidavit and thereby reduce his criminal exposure for lying given the disparate penalties.

IV. RULE 37. SPOLIATION OF EVIDENCE.

Mr. Wikstrom brought Rule 37 back to the committee.

Mr. Wikstrom elicited comments from the committee concerning the alternative language Mr. Shea drafted regarding the spoliation sanction.

The committee suggested a change in the title to subsection (g) from "Spoliation of evidence" to "Failure to preserve." The committee also suggested modifications to the alternative language.

Mr. Blanch expressed concern that a party's duty to preserve should be interpreted broadly. He expressed concern that if the committee limited a duty to preserve only to that evidence it would have been required to disclose under the rules, that duty may exclude evidence that did not support the party's claim, but was never asked for in discovery. Mr. Blanch suggested broader language such as "it has a duty to preserve" to alleviate this concern.

The committee suggested replacing the second and third sentences to the alternative language and including the phrase "including sanctions under Rule 37(b)" to the first sentence.

Finally, the committee suggested deleting the last sentence to the alternative language.

Mr. Wikstrom asked Mr. Shea to prepare a second alternative to the proposed subsection (g) and submit the two alternatives to Colin King for his review and comment.

V. UNBUNDLING IMPACT ON URCP RULES 5, 11, 74, 76.

Mr. Hafen led the discussion regarding unbundling and the impact on the rules of civil procedure. Mr. Hafen began by indicating the Supreme Court asked the committee to review the rules and amend as needed in light of the Court's approval of the amendments to the Utah Rules of Professional Conduct.

The objective of unbundling is to give more people access to legal services who typically could not afford it. Unbundling contains two main components — limited representation and a limited appearance, for example, allowing a lawyer to represent a client at trial, but not during discovery, or solely defending a motion for summary judgment.

Mr. Hafen reviewed the rules of civil procedure and suggested amendments to Rules 5, 11, 74, and the addition of Rule 76 entitled "Limited Appearance." Mr. Wikstrom entertained comments from the committee.

Mr. Lee indicated the last sentence of 11(c) is inconsistent with 11(b)(3) which requires the lawyer to certify that he has sufficient knowledge to make the representations in the pleadings. The proposed 11(c) allows the lawyer to rely on a client's representations.

Mr. Slaugh indicated his concern about limited representation under Rule 11. He wants to allow the scenario where a lawyer can prepare a document and pro se litigant signs it. He used the example of a client who comes into a lawyer's office the day before a statute of limitation runs. In this circumstance, he suggests allowing the lawyer to prepare a pleading and have the client sign it without having to investigate the underlying allegations. Mr. Slaugh suggested the ethical limitations on lawyers are enough and Rule 11 did not need to be amended.

Judge Nuffer countered that ghost writing is unethical in the 10th Circuit. He strongly believed that Rule 11 needs to provide accountability to a ghost writer.

Ms. Threedy expressed concern about the language concerning limited appearances under Rule 5. Her concern centered on how an opposing lawyer, judge, or clerk would know the scope of the limited appearance to fulfill the service requirements. These third parties have no grounds to clarify the relationship between the lawyer and client.

Mr. Carney expressed concern about a lawyer's limited appearance or representation and then subsequently dealing with the product of the lawyer's work, for example, misconduct during a deposition, or addressing a motion to dismiss after a complaint is filed.

Judge Anderson suggested the proposed Rule 76 Limited Appearance should include language stating a party does not have to file a 20-day notice to appear or appoint once the appearance is over.

After extensive discussion, Mr. Wikstrom asked Mr. Hafen to incorporate the suggested changes for the next meeting.

VI. RULE 74. WITHDRAWAL OF COUNSEL.

Judge Anderson brought Rule 74 back to the committee. Judge Anderson expressed his concern that the current rule only prohibits a withdrawal if a motion is pending or a certificate of readiness has been filed. It does not prohibit withdrawal when a trial date has been set pursuant to a duly executed Scheduling Order. The committee questioned whether it wanted to prohibit a lawyer's withdrawal if a trial date had been set, but far enough in the future that new counsel could be prepared to meet the trial date.

Mr. Slaugh moved to adopt language stating "no hearing or trial has been set" and remove all references to "certificate of readiness." After discussion, the committee unanimously approved the changes.

VII. ADJOURNMENT.

The meeting adjourned at 5:47 p.m. The next meeting of the committee will be held at 4:00 p.m. on Wednesday, April 26, 2006, at the Administrative Office of the Courts.